Loh Tina & Ors v Kemuning Setia Sdn Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02(NCVC)(W)-540–03 OF 2019 AND P-02(NCVC)(W)-569–03 OF 2019
SURAYA OTHMAN, LAU BEE LAN AND LEE SWEE SENG JJCA
4 JUNE 2020

Land Law — Housing developers — Transfer of lease — Developer transferred lease of freehold subdivided title of house — Whether developer and proprietor had right to build housing accommodation and sell other than by way of relevant standard form sale and purchase agreement ('SPA') — Whether developer within meaning of Housing Development (Control and Licensing) Act 1966 — Whether purchasers estopped from claiming for specific performance of SPA — Whether whole contract of sale void — Whether statutory standard form contract of sale binding on proprietor — Whether purchasers could claim for specific performance — Housing Development (Control and Licensing) Act 1966 — Housing Development (Control and Licensing) Regulations 1989 reg 11(1) & (3)

In Appeal 540, the plaintiffs/appellants were Loh Tina and six other purchasers while the defendants/respondents were Kemuning Setia Sdn Bhd ('the developer') and five others. The developer held a valid developer's license with respect to a housing development to be built on a piece of freehold land ('the land'). The third defendant was the proprietor of the land. In Appeal 569, the developer as the sole appellant had filed an appeal against the dismissal of its counterclaim against Loh Tina. These appeals heard together dealt with the key issue as to whether a developer under the Housing Development (Control and Licensing) Act 1966 ('the HDA') and its attendant the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations') could transfer a lease of a freehold subdivided title of a house on the ground that the purchasers have agreed to that. The developer had applied to the Controller of Housing for its consent to such a transfer in the sale of the houses to be built on the freehold land in question but the application had been rejected. The developer nevertheless proceeded with signing the prescribed Schedule G sale and purchase agreement ('SPA') with the purchasers, transferring in effect a 99-year lease to the purchasers with an extension for a second period of 99-year lease. The purchasers contended that this was prohibited under the HDA and they prayed for, inter alia, a transfer of the freehold titles to their names. The developer counterclaimed that Loh Tina had not paid the balance purchase price to the unit bought by her. She had argued successfully before the High Court that the amount claimed was a rebate or discount which the developer had given her for referring purchasers to the developer for the purchase of the

residential units. The High Court had dismissed both the claims of the purchasers and the counterclaim of the developer against Loh Tina. Hence the appeal by the purchasers and the developer. The issues for consideration were: (a) whether a developer and a proprietor had a right to build housing accommodation and sell them other than by way of the relevant standard form SPA in Schedule G of the Regulations under the HDA; (b) whether the developer may opt out of the Regulations by asserting that it was not a developer within the meaning of the HDA and thus not bound to use the Schedule G SPA; (c) whether the purchasers were estopped from claiming for specific performance of the SPA as if it had been a Schedule G SPA unamended as they had claimed damages for late delivery and the lease had been created in their favour; (d) whether only the unauthorised variations were void and not the whole of the contract of sale in Schedule G; (e) whether the statutory standard form Schedule G contract of sale was equally binding on the proprietor of the land for development and not just merely the developer; and (f) whether in a case where a leasehold interest in the freehold subdivided title was registered in favour of the purchaser in an amended SPA without the approval of the Controller of Housing, the purchasers could claim for specific performance for a transfer of the freehold subdivided title to them.

Held:

(1) The compliance in reg 11(1)–(3) of the Regulations was clearly and manifestly mandatory. It could not be optional to the developer and proprietor and the question of consent of the purchasers did not arise. To allow the developer to say that it was not bound by the HDA would be to provide a convenient exit and escape from the mandatory provision stipulated under the HDA and that under the prescribed Form G. The developer knew that Schedule G was applicable and recognised that it would require various amendments to comply with the 99 + 99 year lease arrangement envisaged in the joint venture agreement. A developer that deviated from the HDA and the Regulations by modifying the standard statutory form of SPA in Schedule G without a certificate of the Controller approving the modification would be in breach of the HDA and the Regulations. The purchasers would be entitled to enforce their rights as if the SPA had been in its prescribed form without any amendments or modification and to hold the developer and proprietor to the terms as prescribed by Schedule G (see paras 32–33, 37, 53 & 69–70).

(2) Having obtained a license under s 5 of the HDA the developer could not now assert that it was nevertheless not a 'developer' within the meaning of the HDA and thus was at liberty not to follow the relevant Schedule G SPA. Where the standard form contract for sale was a contract for sale in the SPA in Schedule G, the developer could not arrogate to itself the right to convert the sale to a lease in favour of the purchaser without the

approval of the Controller. To allow that would be to open the floodgates to all developers to modify the standard statutory form of SPA in Schedule G as they please and to carve out exceptions and exemptions as they like by creating a lease rather than an outright sale (see paras 78 & 80–81).

(3) The fact that the purchasers had obtained a registration of the lease with no objection prior to the filing of their suit in the High Court did not bar or stop them from making a claim for specific performance based on what they should had obtained ie a transfer of the house together with the land appurtenant thereto which was represented in the subdivided freehold title which should had been transferred wholly and absolutely to the purchasers. The purchasers' right to claim liquidated damages for late delivery was their right as preserved and protected in the provision in cl 24 of the SPA in Schedule G. Having exercised the right to claim for liquidated damages for late delivery, they could not be said to be estopped from pursuing their other rights under the SPA in a case where that right had been unlawfully taken away from them in breach of the HDA and the Regulations. Estoppel did not operate against a statute or statutory form of contract (see paras 84–85 & 87–88).

(4) There was no provision in the HDA or the Regulations that declared that the SPA not in compliance with Schedule G was null and void. It was the relevant clauses in the unauthorised modification to the Schedule G SPA that would be null and void. It was not that the whole of the SPA was void but only the modified clause which the court would hold to be null and void and unenforceable and instead would grant damages based on the clause as stated in the Schedule G SPA as if it had been grafted into the SPA (see paras 95, 98 & 100).

(5) The statutory standard form Schedule G contract of sale could be bipartite or tripartite. The proprietor of the land for development by the developer would very much be a party to the tripartite contract of sale for without its signature in the transfer form in Form 14A of the National Land Code the subdivided title would not be able to be transferred to the purchaser. In a case where the subdivided title is not transferred to the purchaser, then the cause of action is very much also against the proprietor. The proprietor was involved in a very relevant and acute way because whilst the developer had completed and handed over vacant possession of the units to the purchasers, it was the proprietor that had reserved for itself the reversionary interest in the land to which it would assert its interest and title after the expiry of the lease. The proprietor was equally bound to transfer the whole of the subdivided title to the land to each of the purchasers in this case and being a party to the SPA, the purchasers had a cause of action against the proprietor and more so when

the proprietor remained the registered owner of the whole of the freehold title (see paras 101, 104–105 & 107–108).

(6) The statutory prohibition against modifying Schedule G contract of sale and the protection afforded to purchasers would be lost altogether if the purchasers could not enforce what would have been their entitlement under a Schedule G SPA — a sale and transfer to them of the whole of the freehold title to the land upon which their housing accommodation had been built. The court would read the SPA as having Schedule G grafted and incorporated into it so that no developers could escape from what had been prescribed to endorse and enforce that which had been prohibited. The purchasers under the HDA should not have to live under such uncertainties for Parliament intended them to have custody of their title to the house and to deal with it freely as they may deem fit without the need to ask anyone for the issue document of title to deal with a private lease of 99 + 99 years. This was not a case where the purchasers would be unjustly enriched but one where the proprietor would. There was no place for unjust enrichment when the Regulations compels compliance with the statutory standard form of Schedule G SPA and developers and proprietors who choose not to follow it do so at their own detriment (see paras 114–115 & 133–134).

(7) The plaintiffs'/appellants' appeal against the first defendant/respondent developer and the third defendant/respondent proprietor was allowed but the appeals against the other defendants were struck out. The appeal of the first defendant/appellant in a related appeal against Loh Tina as the sole respondent was dismissed as it was clear that the shortfall claimed against her for the purchase price was actually a discount given to her for introducing purchasers to purchase the units. The credit note itself with the words 'discount rebate' was a clear indication of this and it was too late for the developer to resile from it merely because the purchaser Loh Tina was now suing the developer (see paras 141–143).

[Bahasa Malaysia summary

Dalam Rayuan 540, plaintif/perayu adalah Loh Tina dan enam pembeli lain sementara defendan/responden adalah Kemuning Setia Sdn Bhd ('pemaju') dan lima yang lain. Pemaju mempunyai lesen pemaju yang sah berkenaan dengan pembangunan perumahan yang akan dibina di atas sebidang tanah pegangan bebas ('tanah'). Defendan ketiga adalah pemilik tanah. Dalam Rayuan 569, pemaju sebagai perayu tunggal telah mengemukakan rayuan terhadap penolakan tuntutan balasnya terhadap Loh Tina. Rayuan ini didengar bersama-sama menangani isu utama sama ada pemaju di bawah Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta') dan Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan') boleh memindahkan pajakan hak milik pegangan bebas yang dipecah bahagi atas alasan pembeli telah bersetuju terhadapnya. Pemaju telah

memohon kepada Pengawal Perumahan untuk kebenarannya untuk pemindahan penjualan rumah yang akan dibina di tanah pegangan bebas tersebut tetapi permohonan itu telah ditolak. Pemaju tetap menandatangani perjanjian jual beli Jadual G yang ditetapkan ('PJB') dengan pembeli, memindahkan hak pajakan 99 tahun kepada pembeli dengan sambungan untuk tempoh kedua pajakan 99 tahun. Pembeli berpendapat bahawa ini dilarang di bawah Akta dan mereka memohon, antara lain, pemindahan hak milik pegangan bebas kepada nama mereka. Pemaju membuat tuntutan balas bahawa Loh Tina belum membayar harga baki terhadap unit yang dibeli olehnya. Dia telah berjaya berhujah di Mahkamah Tinggi bahawa jumlah yang dituntut adalah potongan atau diskaun yang diberikan oleh pemaju kepadanya untuk merujuk pembeli kepada pemaju untuk pembelian unit kediaman. Mahkamah Tinggi telah menolak kedua-dua tuntutan pembeli dan tuntutan balas pemaju terhadap Loh Tina. Oleh itu, rayuan oleh pembeli dan pemaju. Isu-isu yang perlu dipertimbangkan adalah: (a) sama ada pemaju dan pemilik mempunyai hak untuk membina penginapan perumahan dan menjualnya selain melalui borang standard PJB yang relevan dalam Jadual G Peraturan di bawah Akta; (b) sama ada pemaju boleh memilih untuk tidak mengikut Peraturan dengan menegaskan bahawa ia bukan pemaju dalam maksud Akta dan dengan itu tidak terikat untuk menggunakan Jadual G PJB; (c) sama ada pembeli terhalang daripada menuntut pelaksanaan sepsifik PJB seolah-olah ia adalah Jadual G PJB yang tidak diubah kerana mereka telah menuntut ganti rugi untuk serahan lewat dan pajakan telah dibuat berpihak kepada mereka; (d) sama ada hanya variasi tidak dibenarkan adalah tidak sah dan bukan keseluruhan kontrak penjualan dalam Jadual G; (e) sama ada borang berkanun standard kontrak penjualan Jadual G sama-sama mengikat pemilik tanah untuk pembangunan dan bukan hanya pemaju; dan (f) sama ada dalam kes di mana kepentingan pegangan pajakan atas hak milik pegangan bebas yang dipecah bahagi yang berdaftar berpihak kepada pembeli dalam PJB yang dipinda tanpa persetujuan Pengawal Perumahan, pembeli dapat menuntut pelaksanaan spesifik untuk pemindahan hak milik pegangan bebas yang dipecah bahagi kepada mereka.

Diputuskan:

(1) Pematuhan dalam peraturan 11(1)–(3) Peraturan adalah jelas dan wajib. Tidak boleh menjadi pilihan bagi pemaju dan pemiliknya dan persoalan tentang persetujuan pembeli tidak timbul. Untuk membenarkan pemaju mengatakan bahawa ia tidak terikat oleh Akta akan memberikan jalan keluar dan pelepasan yang mudah dari peruntukan wajib yang ditetapkan di bawah Akta dan yang ditetapkan di bawah Borang G. Pemaju mengetahui bahawa Jadual G terpakai dan menyedari bahawa ia memerlukan pelbagai pindaan untuk mematuhi pengaturan pajakan 99 + 99 tahun yang dirangka dalam perjanjian usaha sama. Pemaju yang menyimpang dari Akta dan Peraturan dengan mengubah borang

berkanun standard PJB dalam Jadual G tanpa perakuan Pengawal yang membenarkan pengubahsuaian tersebut akan melanggar Akta dan Peraturan. Pembeli berhak untuk menegakkan hak mereka seolah-olah PJB berada dalam bentuk yang ditentukan tanpa sebarang pindaan atau pengubahsuaian dan untuk memegang pemaju dan pemilik terhadap syarat yang ditetapkan oleh Jadual G (lihat perenggan 32–33, 37, 53 & 69–70).

(2) Setelah memperoleh lesen di bawah s 5 Akta, pemaju kini tidak dapat menegaskan bahawa ia bukan 'pemaju' dalam maksud Akta dan dengan itu bebas untuk tidak mengikuti Jadual G PJB yang berkaitan. Di mana borang standard kontrak penjualan adalah kontrak penjualan PJB dalam Jadual G, pemaju tidak boleh memberikan sendiri kuasa untuk menukar penjualan kepada pajakan berpihak kepada pembeli tanpa persetujuan Pengawal. Untuk membenarkannya akan membuka ruang kepada semua pemaju untuk mengubah borang berkanun standard PJB dalam Jadual G sesuka hati mereka dan untuk membuat pengecualian yang mereka suka dengan membuat pajakan dan bukan penjualan langsung (lihat perenggan 78 & 80–81).

(3) Fakta bahawa pembeli telah memperoleh pendaftaran pajakan tanpa bantahan sebelum memfailkan guaman mereka di Mahkamah Tinggi tidak menghalang atau menghentikan mereka untuk membuat tuntutan untuk pelaksanaan spesifik berdasarkan apa yang seharusnya mereka perolehi iaitu pemindahan rumah itu bersama-sama dengan aksesori tanah yang diwakili dalam hak milik pegangan bebas yang dipecah bahagi yang seharusnya dipindahkan sepenuhnya dan secara mutlak kepada pembeli. Hak pembeli untuk menuntut ganti rugi jumlah tertentu untuk serahan lewat adalah hak mereka sebagaimana yang terpelihara dan dilindungi dalam peruntukan di klausa 24 PJB dalam Jadual G. Setelah menggunakan hak untuk menuntut ganti rugi jumlah tertentu untuk serahan lewat, mereka tidak dapat dikatakan dihalang daripada mengejar hak mereka yang lain di bawah PJB dalam kes di mana hak itu telah diambil secara tidak sah dari mereka yang melanggar Akta dan Peraturan. Estoppel tidak beroperasi terhadap undang-undang atau kontrak bentuk berkanun (lihat perenggan 84–85 & 87–88).

(4) Tiada peruntukan dalam Akta atau Peraturan yang menyatakan bahawa PJB yang tidak mematuhi Jadual G adalah batal dan tidak sah. Ia adalah klausa yang relevan dalam pengubahsuaian yang tidak dibenarkan di dalam Jadual G PJB yang akan terbatal dan tidak sah. Bukannya keseluruhan PJB batal tetapi hanya klausa yang diubah yang akan dianggap oleh mahkamah sebagai batal dan tidak sah dan tidak dapat dilaksanakan dan sebaliknya akan memberikan ganti rugi berdasarkan klausa seperti yang dinyatakan dalam Jadual G PJB seolah-olah telah dimasukkan ke dalam PJB (lihat perenggan 95, 98 & 100).

(5) Borang standard berkanun Jadual G kontrak penjualan boleh terdiri daripada dua pihak atau tiga pihak. Pemilik tanah untuk pembangunan oleh pemaju akan menjadi pihak kontrak penjualan tiga pihak kerana tanpa tandatangannya dalam borang pemindahan dalam Borang 14A Kanun Tanah Negara, hak milik yang dibahagi tidak akan dapat dipindahkan ke pembeli. Dalam kes di mana hak milik yang dibahagi tidak dipindahkan kepada pembeli, maka kausa tindakan juga terhadap pemiliknya. Pemilik terlibat dengan cara yang sangat relevan dan akut kerana sementara pemaju telah menyelesaikan dan menyerahkan milikan kosong unit tersebut kepada pembeli, pemiliknya telah menyimpan kepentingan balik dalam tanah yang akan dituntut oleh pemiliknya faedah dan hakmilik setelah tamat tempoh pajakan. Pemiliknya sama-sama terikat untuk memindahkan keseluruhan hak milik yang dibahagi terhadap tanah kepada setiap pembeli dalam hal ini dan sebagai pihak PJB, pembeli mempunyai kausa tindakan terhadap pemilik dan lebih-lebih lagi apabila pemilik tetap menjadi pemilik berdaftar keseluruhan hak milik pegangan bebas (lihat perenggan 101, 104–105 & 107–108).

(6) Larangan undang-undang untuk mengubah kontrak penjualan Jadual G dan perlindungan yang diberikan kepada pembeli akan hilang sama sekali jika pembeli tidak dapat menegakkan apa yang menjadi hak mereka di bawah Jadual G PJB — penjualan dan pemindahan kepada mereka dari keseluruhan hak milik pegangan bebas tanah tempat penginapan perumahan mereka dibina. Mahkamah akan membaca PJB dengan Jadual G yang dicantumkan dan dimasukkan ke dalamnya sehingga tidak ada pemaju yang dapat melarikan diri dari apa yang telah ditetapkan untuk mengesahkan dan menegakkan yang telah dilarang. Pembeli di bawah Akta tidak semestinya harus hidup di bawah ketidakpastian tersebut kerana Parlimen bermaksud mereka mempunyai hak terhadap hak milik rumah mereka dan untuk berurusan dengan bebas yang mereka anggap sesuai tanpa perlu meminta dengan sesiapa dokumen hak milik untuk berurusan dengan pajakan peribadi 99 + 99 tahun. Ini bukan kes di mana pembeli akan diperkaya secara tidak adil tetapi di mana pemiliknya akan melakukannya. Tidak ada tempat untuk pengayaan secara tidak adil ketika Peraturan memerlukan pematuhan dengan borang standard berkanun Jadual G PJB dan pemaju dan pemilik yang memilih untuk tidak mengikutinya melakukannya dengan merugikan mereka sendiri (lihat perenggan 114–115 & 133–134).

(7) Rayuan plaintif/perayu terhadap defendan pertama/responden pemaju dan defendan ketiga/responden pemilik dibenarkan tetapi rayuan terhadap defendan lain dibatalkan. Rayuan defendan pertama/perayu dalam rayuan terkait terhadap Loh Tina sebagai satu-satunya responden telah ditolak kerana jelas bahawa kekurangan yang dituntut terhadapnya atas harga belian sebenarnya adalah diskaun yang diberikan kepadanya

kerana memperkenalkan pembeli untuk membeli unit tersebut. Nota kredit itu sendiri terdapat perkataan 'potongan harga' merupakan petunjuk yang jelas mengenai hal ini dan sudah terlambat bagi pemaju untuk menolaknya hanya kerana pembeli Loh Tina kini menuntut pemaju (lihat perenggan 141–143).]

Cases referred to

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281, FC (refd)
City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285, FC (refd)
Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd (No 1) [2009] 5 MLJ 381, CA (refd)
Johnson and another v Moreton [1978] 3 All ER 37, HL (refd)
Lee Poh Choo v SEA Housing Corporation Sdn Bhd [1982] 1 MLJ 324 (refd)
SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, FC (refd)
Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852, CA (refd)
Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals [2018] 3 MLJ 141; [2018] 3 MLRA 1, FC (refd)
Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd [2011] 2 MLJ 141, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, item 17
Housing Development (Control and Licensing) Act 1966 ss 3, 3A, 5, 24
Housing Development (Control and Licensing) Regulations 1989 regs 3(6), 5(4), 11(1), (1A), (1B), (2), (3), 12, 12(1), (2), Schedules H, G
Moneylenders Act 1951 s 10P(3)
National Land Code ss 221, 222, 223, 224, 225, 226, 227, 228, 228A, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, Forms 14A, 15A

Appeal from: Civil Suit No PA-22NCVC-112–06 of 2016 (High Court, Pulau Pinang)

Ranjit Singh (Jonanthan Victor Rozario and Ville Nethi with him) (Jon Rozario & Co) in Civil Appeal No P-02(NCVC)(W)-540–03 of 2019 for the appellants.
Abd Shukor Ahmad (Ambbi Sundrambal Balakrishnan with him) (Shukor Baljit & Partners) in Civil Appeal No P-02(NCVC)(W)-569–03 of 2019 for the appellant.
Abd Shukor Ahmad (Ambbi Sundrambal Balakrishnan with him) (Shukor Baljit & Partners) in Civil Appeal No P-02(NCVC)(W)-540–03 of 2019 for the first and second respondents.
Allen Choong (Allen & Assoc) in Civil Appeal No P-02(NCVC)(W)-540–03 of 2019 for the third, fourth and sixth respondents.
Cheng Theng Keat (Cheng, Lee & Goh) in Civil Appeal No

P-02(NCVC)(W)-540–03 of 2019 for the fifth respondent.
Ranjit Singh (Jonanthan Victor Rozario and Ville Nethi with him) (Jon Rozario & Co) Civil Appeal No P-02(NCVC)(W)-569–03 of 2019 for the respondent.
Albert Soo Kim Yan (Andrew Chan Kah Jun with him) (KY Soo) watching brief for the House Buyers Association.

Lee Swee Seng JCA (delivering judgment of the court):

[1] These appeals heard together deal with the key issue as to whether a developer under the Housing Development (Control and Licensing) Act 1966 ('the HDA') and its attendant Regulations can transfer a lease of a freehold subdivided title of a house on the ground that the purchasers have agreed to that.

[2] The developer had applied to the Controller of Housing for its consent to such a transfer in the sale of the houses to be built on the freehold land in question but the application had been rejected.

[3] The developer nevertheless proceeded with signing the prescribed Schedule G sale and purchase agreement ('SPA') with the purchasers transferring in effect a 99-year lease to the purchasers with an extension for a second period of 99-year lease.

[4] The purchasers contended that this is prohibited under the HDA and they prayed for, inter alia, a transfer of the freehold titles to their names.

[5] There was also a related appeal by the developer claiming that Loh Tina had not paid the balance purchase price to the unit bought by her. She had argued successfully before the High Court that the amount claimed was a rebate or discount which the developer had given her for referring purchasers to the developer for the purchase of the residential units. In fact she was issued a credit note for RM350,000 by the developer with the words 'discount rebate' written on it.

[6] The High Court had dismissed both the claims of the purchasers and the counterclaim of the developer against Loh Tina.

[7] The High Court was of the view that there had been no misrepresentation and that the purchasers were fully aware that they would only be getting a leasehold interest in the land and they had consented to it.

[8] Hence the appeal before us by the purchasers and the developer.

PARTIES

[9] The plaintiffs who are the appellants in Appeal No R21 P-02(NCvC)(W)-540–03 of 2019 ('Appeal 540') are Loh Tina and six other purchasers. The defendants there are Kemuning Setia Sdn Bhd ('Kemuning Setia') and five others. The first defendant Kemuning Setia is a housing developer holding a valid developer's license ('the license') issued under reg 3(6) of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations').

[10] The license was issued to the developer with respect to a housing development of 43 units of three storey terrace and 48 units of three storey semi-detached houses ('the units') to be built on a piece of freehold land known as Lot No, 1560, Section 5, Town of Georgetown, North East District, Penang ('the land').

[11] The said housing development was marketed as 98 Greenlane. The developer was also issued with an Advertising and Sale Permit in respect of the units under reg 5(4) of the Regulations ('the permit').

[12] The third defendant is K-Asia Holdings Sdn Bhd ('K-Asia') who is the proprietor of the land.

[13] The second defendant is Tan Swee Leong aka Steven Tan is a shareholder and director of the first defendant; the only other shareholder and director being his wife. The plaintiffs contended that Steven Tan is the controlling mind of the first defendant and effectively its alter-ego at all material times.

[14] The fourth and fifth defendants are the Koh brothers CP Koh and CJ Koh and together with their cousin CL Koh the sixth defendant and another of their brother CK Koh, are all directors and shareholders of K-Asia with the exception of CK Koh who is just a shareholder and not a party named as the defendants here. They were all at one time the beneficial and registered owners of the land.

[15] The land was divided into two parts with a two-fifth portion being subdivided into various freehold lots and and transferred to K-Asia for the purposes of the development of 98 Greenlane. These freehold lots included the plaintiffs' lots held in five subdivided freehold titles.

[16] In the Appeal R22 P-02(NCvC)(W)-569–03 of 2019 ('Appeal 569') Kemuning Setia as the sole appellant who was the first defendant in the High

Court below had filed an appeal against the dismissal of its counterclaim against Loh Tina for what was alleged as the balance purchase price not paid by her and which she said was a discount that the developer gave her for the purchasers introduced by her.

[17] The counterclaim by the first defendant was for the sum of RM350,000 represented in the credit note given to the first plaintiff which was said to be given without any consideration.

[18] The first defendant had also very audaciously prayed for a declaration that the second, third, fourth and sixth plaintiffs are vexatious litigants within the meaning of item 17 of the Schedule to the Courts of Judicature Act 1964.

[19] The High Court had dismissed both the plaintiffs' claim and the first defendant's counterclaim.

PRINCIPLES

Whether a developer and a proprietor have a right to build housing accommodation and sell them other than by way of the relevant standard form SPA in Schedule G of the Regulation under the HDA

[20] The SPA signed should rightly have been in the prescribed Schedule G of the Regulations. There were thus copious amendments made to the SPA in Schedule G and that was done without the consent of the Controller of Housing. The material amendments when compared with the unamended Schedule G are clearly contrasted in the table found in Appendix A to the amended statement of claim at pp 140–148 of the appeal record. The title of 'Sale and Purchase Agreement' is substituted with the title or 'Build and Lease Agreement'.

[21] Very materially the reference to Kemuning Setia as a developer duly licensed under the HDA had been deleted. So too is the deletion of the reference to the proprietor giving absolute right to the vendor to develop the said land (referring to the subdivided title) as a housing development and to sell the said land and in place thereof is the expression that the proprietor had given the vendor the absolute right to develop and construct on the said land.

[22] Very significantly and subtly the reference to the proprietor agreeing to the sale of the said land for the purpose of the agreement was replaced with the reference to the proprietor agreeing with the vendor that it shall grant to the purchaser a lease over the said land for a term of 99 years with an irrevocable option to extend for a further term of 99 years (the lease term) and upon the terms and conditions provided there in!

[23] Another material deletion is the reference to the vendor agreeing to sell and the purchaser agreeing to purchase the whole of the said land with vacant possession together with the housing unit to be built on the said land subject to the terms and conditions therein.

[24] Any reference to the purchaser agreeing to purchase the said land is now converted into the purchaser agreeing to the creation of a lease in the format attached and to take a lease of the said land.

[25] All references to a memorandum of transfer are now replaced with a memorandum of lease in Form 15A of the National Land Code.

[26] Thus the stamp duty to be paid on a transfer is now replaced with the stamp duty to be paid on the creation of a lease.

[27] There was even a declaration, which is not found in the Schedule G SPA, that the purchaser acknowledged that he had been properly explained and knew full well the nature of the interest created by the proprietor which is a registered lease as provided for under Part 15 (ss 221–240) of the National Land Code.

[28] However that does not engender confidence with respect to the independence of the advice as the solicitors for the purchasers in the SPA are the solicitors for the developer who prepared the SPA. The solicitor who attested the signature of the purchasers was Miss Lee Kim Noor the principal partner of Messrs KN Lee & Associates!

[29] As stated in the Court of Appeal case of *Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd (No 1)* [2009] 5 MLJ 381:

> [20] Section 24 of the Act confers on the Minister the power to make regulations for the purpose of carrying into effect the provisions of the Act. Pursuant thereto, the Housing Developers (Control and Licensing) Regulations 1989 were brought into existence. Regulation 11 thereof expressly provides for the standard form of contract of sale.

[30] Regulation 11(1) of the Regulations is crystal clear in that the SPA in the prescribed form and in this case, Schedule G is to be used for the SPA. There is to be no waiver or modification of any of the provisions of the contract of sale unless there is a certificate in writing granted by the Controller of Housing for the waiver or modification as provided for in reg 11(3) of the Regulations. The requirement is so strict that there shall be no approval of an application for a waiver or modification if such an application is made after the

A expiry of the time stipulated for the handing over of vacant possession under the contract of sale as spelt out in the proviso to reg 11(3).

[31] Before granting such a certificate the Controller of Housing under reg 11(3) of the Regulations must be satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impractical or unnecessary.

[32] Regulation 11(1)–(3) of the Regulations are reproduced below for an appreciation of its strict provisions as follows:

> 11 Contract of sale
>
> (1) *Every contract of sale for the sale and purchase of a housing accommodation* together with the subdivisional portion of land appurtenant thereto *shall be in the form prescribed in Schedule G* and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.
>
> (1A) Notwithstanding paragraph (1), every contract of sale for build then sell for a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule I and where the contract of sale for build then sell is for the sale and purchase of a housing accommodation in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule J.
>
> (1B) *Subregulations (1)* and (1A) *shall not apply if* at the time of the execution of the contract of sale, the *certificate of completion and compliance for the housing accommodation has been issued* and a certified true copy of which has been forwarded to the purchaser.
>
> (2) No person including parties acting as stakeholders shall collect any payment by whatever name called except as prescribed by the contract of sale.
>
> (3) Where the *Controller* is satisfied that owing to *special circumstances or hardship* or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a *certificate in writing, waive or modify such provisions*:
>
> > Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller. (Emphasis added.)

[33] The compliance is clearly and manifestly mandatory. It cannot be optional to the developer and proprietor and the question of consent of the purchasers does not arise.

[34] The Court of Appeal in *Foong Seong Equipment Sdn Bhd (receivers and managers appointed)* was clear on the mandatory nature of Schedule G in our case and there is no contracting out save with the approval of the Controller of Housing as explained:

> [21] A plain reading of the mandatory provisions contained in reg 11 reveals that it provides for two categories of the standard statutory sale and purchase agreement. The sale and purchase agreement for housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G. In the case of subdivided building, it shall be in Schedule H. *The parties thereto are not permitted to contract out of it. As a general rule, compliance with these statutory contracts of sale is mandatory*; an exception arises only with the approval of the controller of housing, in the form of a certificate in writing, in order to waive or modify the provisions thereof. (Emphasis added.)

[35] As stated on many an occasion the HDA and the Regulations are a social piece of legislation designed to protect the innocent purchasers who have little or no bargaining power and who are often, like here, not conscious as to their legal rights under the law.

[36] Who would want a leasehold when legally they are entitled to a freehold property in a sale and purchase of a house to be built by a developer? Any consent by the purchasers must have been given without being conscious and cognisant of their rights under the law. It is precisely such a mischief of developers riding roughshod over the rights of the purchasers that Parliament has seen it fit to enact the HDA and the minister concerned, the Regulations.

[37] To allow the developer to say that it is not bound by the HDA would be to provide a convenient exit and escape from the mandatory provision stipulated under the HDA and that under the prescribed Form G. That would be to denude and defeat the safeguards that the HDA was specially structured to shield unsuspecting purchasers against whatever may be the subtle and sly attempt by a developer to circumvent the law.

[38] As far back as the case of *Lee Poh Choo v Sea Housing Corporation Sdn Bhd* [1982] 1 MLJ 324, Mohamed Dzaidin JC (later CJ) (as he then was), had stated:

> As I have stated earlier the Housing Developers (Control and Licensing) Act 1966 and its 1970 Rules were introduced for public interest to regulate and control business of housing developers. In my opinion the Act and the rules must be strictly followed.

[39] His Lordship also quoted with approval the case of *Johnson and another v Moreton* [1978] 3 All ER 37 as follows:

A On page 56 Lord Simon stated as follows:

> The principle which, in my view, emerges from this line of authority is as follows. Where it appears that the mischief which Parliament is seeking to remedy is that a situation exists in which relations of parties cannot properly be left to private contractual regulation, and Parliament therefore provides for statutory regulation, a party cannot contract out of such statutory regulation (albeit exclusively in his own favour) because so to permit would be to reinstate the mischief which the statute was designed to remedy and to render the statutory provision a dead letter.

[40] The above pronouncement was confirmed by the Federal Court in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 at p 34 where Suffian LP (as he then was) in giving a brief background to the HDA explained as follows:

> It is common knowledge that in recent years, especially when the government started giving housing loan making it possible for public servants to borrow money at 4% interest to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most are whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act ...
>
> ...
>
> Thus it is clear that only terms and conditions designed to comply with the requirements of the rules that may be inserted in a contract of sale of land that is governed by the Act and rules, and that on the contrary terms and conditions which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted.

[41] The same spirit and sentiment has survived the passage of time and was again echoed recently by the Federal Court in *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141 at p 144, wherein it was explicitly stated as follows:

> In this country, the relationship between a house buyer and a licensed developer is governed by the housing developers legislation. Its object is to protect house buyers against the developers. A developer must execute the agreement set out in the schedule to the relevant subsidiary legislation. He cannot add other clauses in it.

[42] The Federal Court in *Maxisegar* affirmed and approved of the above pronouncement in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* and in *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852.

[43] In *Sentul Raya* at p 859, the Court of Appeal in dealing with a dispute over a Schedule H statutory contract prescribed under the Regulations (which is the equivalent of Schedule G in respect of condominiums and such stratified

developments) observed as follows:

> The contract which has fallen for construction in the present case is a special contract. It is prescribed and regulated by statute. *While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed.* So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract. (Emphasis added.)

[44] Likewise too the Court of Appeal in *Foong Seong Equipment Sdn Bhd (receivers and managers appointed)* summarised succinctly the legion of cases on the HDA being a social piece of legislation and that its provisions should be given a liberal and purposive interpretation to protect the purchasers as follows:

> [37] In relation to residential properties, the housing development account is obviously intended to protect the purchasers from becoming victims of abandoned housing projects. The housing legislation being a piece of social legislation must be construed purposively, beneficially and liberally in favour of the purchasers.
>
> [38] In *Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd (No 2)* [2006] 5 MLJ 372; [2005] 7 CLJ 70 at p 77 (HC), I have the occasion to construe this social legislation. The principles, relevant to the instant appeal, may be distilled as follows:
>
> (1) it is trite law that the housing legislation is principally aimed at protecting the interest of purchasers: see *Malaysian Law on Housing Developers* (2nd Ed) by Salleh Buang, 2002 pp 7–8; *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 1 MLJ 324; [1982] CLJ 355; [1982] CLJ Rep 305 per Suffian LP (as he then was); and *Khaun Daw Yau v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 at p 341 per VC George J (later JCA); and
>
> (2) the Act is a piece of social legislation and hence its provisions should be given liberal and purposive interpretation ie to promote the general legislative purpose underlying the provisions (see s 17A of the Interpretation Acts 1948 and 1967; and *Tribunal Tuntutan Pembeli Rumah v Westcourt Corporation Sdn a Bhd & Other Appeals* [2004] 3 MLJ 17; [2004] 2 CLJ 617; as affirmed in *Westcourt Corporation Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah* [2006] 1 MLJ 339; [2004] 4 CLJ 203 by the Federal Court through the judgment of Ahmad Fairuz CJ Malaysia).

[45] Recently, the Federal Court in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 has even taken a stricter stand in favour of purchasers when it observed as follows:

> [40] The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. Parliament has entrusted the Minister to safeguard the interests of the

purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H. We find no contrary indication in the language, scope or object of the Act that such duty to safeguard the interests of the purchasers may be delegated to some other authority.

[46] To impress upon developers and proprietors the seriousness of the prohibition against modifications of the contract of sale in Schedule G for instance, it is provided under reg 12(1) of the Regulations penalties such that:

> (1) Any person who contravenes any of the provisions of these Regulations shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to a term of imprisonment not exceeding three years or to both.

[47] If directors, legal advisers and the like think that they are beyond the long arm of the law it is provided in s 11(3) as follows:

> (3) Any person who knowingly and wilfully aids, abets, counsels, procures or commands the commission of an offence against any provision of these Regulations shall be liable to be punished with the punishment provided for the offence.

[48] In cases where a developer thinks that it satisfies the circumstances spelt out in s 11(3) it could apply for the certificate in writing from the Controller of Housing for the relevant provisions to be waived or modified.

[49] This was observed by none other than Suffian LP in *SEA Housing* at p 34 that the safeguard for a developer could be found in rule 12(2), which is presently our reg 11(3), and it stated as follows:

> Thus in the circumstances of this case it would have been open to the developer to try and persuade the Controller to modify the rigours of paragraphs (o) and (r) of rule 12(1). If it had succeeded it would have escaped liability. But it made no attempt to do so.

[50] In the event that the developer is aggrieved by the decision of the Controller the remedy is already provided for in reg 12 on appeal to the Minister in charge as follows:

> Notwithstanding anything to the contrary in these Regulations, any person aggrieved by the decision of the Controller under paragraph (3) of regulation 3, paragraph (1) of regulation 4, paragraph (4) of regulation 5, paragraph (2) of regulation 9 or paragraph (3) of regulation 11 may, within fourteen (14) days after having been notified of the decision of the Controller, appeal against such decision to the Minister; and the decision of the Minister made thereon shall be final and shall not be questioned in any court.

[51] In fact the developer here did apply to the Controller of Housing but the application was rejected. Kemuning Setia the first defendant in its letter

dated 31 January 2012 ('January 2012 letter') acknowledged that 'maka beberapa peruntukan di dalam Perjanjian Jual beli di bawah Schedule G terpaksa dibuat pindaan agar selaras dengan peruntukan Perjanjian Usahasama bertarikh 8.4.2008' and it stated that 'kami memohon kelulusan Tuan seperti yang diperlukan di bawah Regulation 11(3)' and enclosed a proposed amended draft of Schedule G ('the first draft').

[52] Translated it means that it acknowledged that 'thus various provisions in the Sale and Purchase Agreement have to be amended so as to be consistent with the provisions in the Joint Venture Agreement dated 8.4.2008' and it stated that 'we are applying for your approval as required under Regulation 11(3)'.

[53] We cannot but agree with learned counsel for the plaintiffs that this shows that the developer knew that Schedule G was applicable and recognised that it would require various amendments to comply with the 99 + 99 year lease arrangement envisaged in the JVA.

[54] In fact this was conceded under cross-examination by the second defendant Mr Tan Swee Leong, who is a director and shareholder of the developer. He was also well aware of reg 11(3) and the need for a certificate in writing from the Controller of Housing for any amendments to Schedule G, without which the development could not proceed.

[55] The January 2012 letter was followed by another letter dated 27 April 2012 from the developer's solicitors, Messrs KN Lee & Assoc to the National Housing Department ('April 2012 letter'). The April 2012 letter referred to the January 2012 letter and purported to enclose a fresh draft for approval ('the second draft').

[56] Messrs KN Lee & Assoc then issued a further letter dated 21 May 2012 ('May 2012 letter') to follow up on the matter. The second defendant in his evidence agreed that the May 2012 letter pressed the National Housing Department for early approval because the developer wanted to launch 98 Greenlane quickly. The second defendant reluctantly admitted that without the approval from the National Housing Department, the developer could not launch the project.

[57] By way of a letter dated 25 July 2012, the National Housing Department informed the developer who is the first defendant here that its application for the amendment of the Schedule G SPA 'tidak dapat dipertimbangkan' which means 'could not be considered' ('the rejection letter').

[58] It was accepted by both the second defendant and Lee Kim Noor ('DW8') who is the partner from the legal firm acting for the developer Messrs KN Lee & Assoc that the rejection letter was in fact a rejection of the application(s) made.

[59] The developer would not receive 'no' for an answer from the Controller of Housing because too much was at stake. Any delay in the launching and sale of the houses to be constructed would mean a further loss and expense that it would have to incur.

[60] A meeting was arranged in August of 2012 with one Puan Punima ('the meeting'). Both DW2 (Tan Kok Siang) and DW5 (Tan Hiang Joo) testified to being present at the meeting. Tan Hiang Joo's evidence was that he handed Puan Punima of the National Housing Department a copy of a further draft ('the third draft') and conveyed the developer's intention to go ahead with the launch and development. As there was no comment from the said Puan Punima it was taken by the developer that it must be all right for it to proceed.

[61] Nothing could be further from the truth. In fact the Federal Court has very recently in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* in the context of a Schedule H SPA, expounded on the power of the Controller of Housing when it comes to the important matter of issuing a certificate under a reg 11(3) of the Regulations with respect to any waiver or modification of the statutory standard form contract of sale which in the present case is Schedule G. The Federal Court scrutinised the HDA and the Regulations and concluded that the Controller of Housing has not been delegated the power to issue such a certificate and that reg 11(3) is ultra vires the HDA. The Federal Court laid the context as follows for an appreciation of the import of the argument that even the Controller of Housing has not been delegated the power to issue the said certificate by referring first to s 24 of the HDA as follows:

> [24] ... 24 Power to make regulations
>
> (1) Subject to this section, the Minister may make regulations for the purpose of carrying into effect the provisions of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing power, the regulation may —
>
> (a) ...
>
> (b) ...
>
> (c) prescribe the form of contents which shall be used by a licensed housing developer, his agent, nominee or purchaser both as a condition of the grant of a license under this Act or otherwise;
>
> (d) ...

(e) regulate and prohibit the conditions and terms of any contract between a licensed housing developer, his agent or nominee and his purchaser;

[25] Section 24(2) of the Act empowers the Minister to prescribe the statutory form of contract for the sale and purchase agreement between the developer and the purchasers and to regulate the terms and conditions of the contract of sale. Pursuant to sub-s 24(2) of the Act, the Minister promulgated the Regulations prescribing the statutory form for the contract of sale in Schedule H together with the conditions and terms of such contract.

[26] Having prescribed the Statutory Form H and the terms and conditions for the contract of sale, the Minister by reg 11(3) of the Regulations then empowers the controller to waive or modify the conditions and terms of the contract of sale as prescribed in Schedule H. This begs the question whether by empowering the controller to waive or modify the conditions and terms of the contract, the Minister has exceeded the scope of the authority conferred on him by the legislature? In other words, by empowering the controller, through reg 11(3), has there been an act of sub-delegation by the Minister to the controller which is ultra vires the Act?

[62] The Federal Court speaking through Justice Tengku Maimun Chief Justice authoritatively pronounced as follows:

[58] There is one other aspect of the legislation that must be noted, namely that the Act has specifically enumerated the respective duties and powers of the Minister, the controller and an inspector. The management of the Housing Development Account is under the purview of the controller. Specific powers of an inspector can be found in ss 10A, 10B, 10C, 10D, 10E and 10F, whilst *powers to give directions for the purpose of safeguarding the interests of purchasers are specifically given to the Minister.* Where powers or duties may be exercised by either the controller or an inspector, that has been made clear by the Act. For instance, under s 10, either the controller or an inspector, on his own volition or upon being directed by the Minister, may investigate the commission of any offence under the Act or investigate into the affairs of or into the accounting or other records of any housing developer.

[59] The powers and duties of the Minister, the controller and an inspector, respectively had thus been clearly defined. It is also pertinent to highlight, that by s 4(2), express provisions were made for the exercise of an inspector's powers by the controller. By sub-ss(3) and (4) of s 4, Parliament had expressly allowed for the delegation of the controller's powers to named persons. But *there is no such provision enabling the controller to exercise the Minister's powers. This supports our view that Parliament did not intend for the Minister's powers to regulate the terms and conditions of a contract of sale to be delegated to the controller.*

[60] On the above analysis, we hold that *the controller has no power to waive or modify any provision in the Schedule H contract of sale because s 24 of the Act does not confer power on the Minister to make regulations for the purpose of delegating the power to waive or modify the Schedule H contract of sale to the controller. And it is not open to us to read into the section an implied power enabling the Minister to do so. We consequently hold that reg 11(3) of the Regulations, conferring power on the controller to waive and*

A *modify the terms and conditions of the contract of sale is ultra vires the Act.* (Emphasis added.)

B **[63]** The ramifications from the above decision would continue to reverberate in the housing development industry for years to come as purchasers of housing units from developers are now more conscious of their rights under the law and as developers continue to seek novel schemes to escape the standard form SPA prescribed under the HDA and the Regulations, which some developers in maximising profits would find the clauses rather stringent and suffocating against the risks that they have to bear in all housing development.

C

[64] In the light of the above pronouncement there is no need to belabour the issue of the Controller of Housing waiving or modifying any clauses of the Schedule G SPA as there was not even a letter issued by the Controller, much less a certificate; all of which would still be not valid as decided above.

D

[65] Suffice to say that instead of pursuing the appeal, it then conveniently made an about-turn and took the position that the application for waiver or modification was not necessary to begin with. The developer then proceeded unilaterally with its modifications and finalised its version of materially modifying Schedule G for execution by the purchasers.

E

[66] To buffer the consequences of its actions and as it were, to push the blame to the Minister, it then forwarded again its materially modified Schedule G to the officer in the Ministry that it was dealing with. It now takes the stand that since the Minister did not revert back it must be taken that the Minister had given the go ahead and had approved of the modifications.

F

G **[67]** Nothing can be further from the truth; any waiver or modification must be by a certificate in writing expressly waiving or modifying specific provisions of Schedule G in this case and nothing short of that would be a valid waiver or modification.

H **[68]** The fact that the developer or the proprietor and their directors were not charged is no justification for saying that the approval of the Minister to the waiver and modification had been obtained or at least tacitly approved.

I **[69]** A developer that deviates from the HDA and the Regulations by modifying the standard statutory form of SPA in Schedule G without a certificate of the Controller approving the modification would be in breach of the HDA and the Regulations.

[70] More than that the purchasers would be entitled to enforce their rights as if the SPA had been in its prescribed form without any amendments or modification and to hold the developer and proprietor to the terms as prescribed by Schedule G.

[71] The consequences of such a breach would be explored further.

Whether the developer may opt out of the Regulations by asserting that it is not a developer within the meaning of the HDA and thus not bound to use the Schedule G of the SPA

[72] The HDA was designed for the express purpose as stated in the long title. It is an Act to provide for the control and licensing of the business of housing development in Peninsular Malaysia, the protection of the interest of purchasers and for matters connected therewith.

[73] A developer undertaking a housing development as defined under the HDA must have a license under s 5 of the HDA and must comply with the HDA as well as the Regulations.

[74] Was the developer carrying out a 'housing development' within the meaning of the HDA? Section 3 interpretation defines 'housing development' as follows:

> means to develop or construct or cause to be constructed in any manner whatsoever *more than four units of housing accommodation* and includes the collection of moneys or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or *the sale of more than four lots of land or building lots with the view of constructing more than four units of housing accommodation*; (Emphasis added.)

[75] Here it is not denied that the developer in the first defendant developed more than four units of houses and it would be fair to ask if these houses come within the meaning of 'housing accommodation'.

[76] Again under s 3 interpretation 'housing accommodation' includes any building, tenement or messuage which is wholly or principally constructed, adapted or intended for *human habitation* or partly for human habitation and partly for business premises and such other type of accommodation as may be prescribed by the Minister from time to time to be a housing accommodation pursuant to s 3A.

A **[77]** The terrace and semi-detached houses clearly come within the meaning of 'housing accommodation' and indeed the developer had obtained a license under the HDA with respect to the units.

B **[78]** Having obtained a license under s 5 of the HDA the developer cannot now assert that it is nevertheless not a 'developer' within the meaning of the HDA and thus is at liberty not to follow the relevant Schedule G SPA. It cannot pick and choose which provisions of the HDA it wants to follow and which it does not want to follow. It cannot say that it has followed the provisions on advertising permit and the licensing requirement but not the prescribed Schedule G SPA.

C

[79] The learned trial judge appeared to have been influenced by the fact that the Regulations would only apply if the 'land' with appurtenant to the housing accommodation is sold as can be seen below. Here there is no sale but instead the granting of a lease and the contract is titled 'Sale and Purchase Agreement (Build and Lease)':

D

> 'Land' is defined in regulation 2 of the Regulations as meaning 'the land on which a licensed housing developer proposes to erect, or on which he is erecting, housing accommodation and includes the land appurtenant to the housing accommodation'.

E

[80] That may be a creative interpretation placed by learned counsel for the developer which found favour with the learned judge but where the standard form contract for sale is a contract for sale in the SPA in Schedule G, the developer cannot arrogate to itself the right to convert the sale to a lease in favour of the purchaser without the approval of the Controller.

F

G **[81]** To allow that would be to open the floodgates to all developers to modify the standard statutory form of SPA in Schedule G as they please and to carve out exceptions and exemptions as they like by creating a lease rather than an outright sale. Purchasers who are unaware of their rights would be at the mercy of developers who would want a second round of development business after the expiry of the lease granted and doubtless the purchasers would have to vacate the housing accommodation that they have fully paid for upon the expiry of the lease. See cl 18 of the Annexure lease agreement on 'Surrender of Possession of the Property'.

H

I **[82]** This is a case where Parliament in the HDA and the Minister in the Regulations have prescribed a statutory standard form contract in Schedule G to protect the interest of purchasers.

[83] The freedom of contract of the developer and proprietor to include and incorporate terms that are different and often times less favourable to purchasers has been taken away. A

Whether the purchasers are estopped from claiming for specific performance of the SPA as if it had been a Schedule G SPA unamended as they had claimed damages for late delivery and the lease had been created in their favour B

[84] The fact that the purchasers had obtained a registration of the lease with no objection prior to the filing of their suit in the High Court does not bar or stop them from making a claim for specific performance based on what they should have obtained, ie a transfer of the house together with the land appurtenant thereto which is represented in the subdivided freehold title which should have been transferred wholly and absolutely to the purchasers. C

[85] The purchasers' right to claim liquidated damages for late delivery is their right as preserved and protected in the provision in cl 24 of the SPA in Schedule G. D

[86] That right cannot be taken away from them. In fact any change or modification to that right is ineffective, null and void without the certificate from the Controller agreeing to the modification of the period to deliver practical completion. E

[87] Having exercised the right to claim for liquidated damages for late delivery, they cannot be said to be estopped from pursuing their other rights under the SPA in a case where that right had been unlawfully taken away from them in breach of the HDA and the Regulations. F

[88] In any event estoppel does not operate against a statute or statutory form of contract. See the Federal Court case of *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals* [2018] 3 MLJ 141; [2018] 3 MLRA 1 at paras [103] and [105]. G

[89] The fact that the lease had been registered in the names of the purchasers cannot be a bar to their action for compelling the developer and proprietor to transfer the land to them as would be the case had the SPA been in the form of Schedule G. H

[90] The fact that the purchasers had seemingly agreed to take a lease instead of a transfer of the whole of the freehold title to them apparently without knowing their rights, does not affect a jot of their rights which the statute in the HDA and the Regulations have its designed purpose of protecting and preserving. The fact that the SPA in the version that the purchasers signed had I

been performed and perfected cannot bar the purchasers from asserting their rights under what would have been the right and proper SPA in Schedule G that they should have signed and which the law requires the developer to make available to the purchasers to sign.

[91] It is no different from an unlicensed moneylender justifying the charging of interest on a loan on the ground that the borrower had volunteered the payment of interest for he needed the money badly!

[92] The intention of Parliament was clearly to prevent purchasers who may not be fully aware of their rights to be exploited by developers to the purchasers' detriment.

Whether only the unauthorised variations are void and not the whole of the contract of sale in Schedule G

[93] Learned counsel for the defendants argued that if the court is not with them then the whole SPA is null and void for non-compliance and not just the clause on the granting of a lease.

[94] With respect we cannot agree. The intention of Parliament was to ensure that the purchasers receive what is provided for in the HDA and the Regulations and here it is the housing accommodation and the land on which it has been built been sold and transferred to them and registered in their names.

[95] There is therefore no provision in the HDA or the Regulations that declared that the SPA not in compliance with Schedule G is null and void.

[96] There is much wisdom in not so declaring for the purchasers having paid the full purchase price would deserved to have the housing accommodation and the land transferred to them and registered in their names; not a mere lease of 99 years plus another 99 years.

[97] The Federal Court in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285 had authoritatively held that any attempt to contract out of the HDA and its attendant Rules, 'even if successfully executed would be null and void and of no effect'. It further pronounced at p 290 as follows:

> ... A device to avoid possible consequence to statutory provision is not wrong if and only if it can be done legitimately. The attempt of the appellants to contract out of the Act is clearly not a device which can be described as legitimate. It is an open defiance of the Housing Developers legislation. Having regard to the policy and

> objective of Housing Developers Act 1966 and the 1970 Rules made thereunder the protection afforded by this legislation to house buyers is not merely a private right but a matter of public interest which Parliament has intended to protect from being bargained away or renounced in advance by an individual purchaser ...

[98] It is the relevant clauses in the unauthorised modification to the Schedule G SPA that would be null and void. Unlike the Moneylenders Act 1951 that declares all moneylending agreements not in compliance s with the Act to be void and unenforceable, neither the HDA nor the Regulations so declare and the intention must be that the Legislature wanted to save that which is in compliance with the prescribed Schedule G contract of sale and only strike down as null and void those clauses that are in contravention of Schedule G.

[99] Section 10P(3) of the Moneylenders Act 1951 reads:

> Any moneylending agreement which does not comply with the prescribed form shall be *void* and have no effect and shall *not be enforceable*. (Emphasis added.)

[100] Thus, for example, a developer that had not properly obtained an extension of time to deliver practical completion to the purchaser within 24 months from the date of the SPA but nevertheless thought it had and chose not to pay a late delivery claim would be compelled by a court to pay based on the clause for late delivery in the Schedule G SPA. So too a developer that had incorporated a different time frame to the completion period of delivering practical completion. It is not that the whole of the SPA is void but only the modified clause which the court would hold to be null and void and unenforceable and instead would grant damages based on the clause as stated in the Schedule G SPA as if it had been grafted into the SPA.

Whether the statutory standard form Schedule G contract of sale is equally binding on proprietor of the land for development and not just merely the developer

[101] The statutory standard form Schedule G contract of sale can be bipartite or tripartite.

[102] In a bipartite SPA the developer is also the proprietor of the land to be developed as it is also the registered owner of the land. However the reality of housing development in Malaysia is that there are developers with the relevant experience but they do not have the means to purchase the land or that they rather use their capital for construction and so to allow them better cash flow, they would enter into a joint venture with land owners or proprietors of the land who may not have the expertise for construction.

[103] The joint venture agreement would incorporate terms like what is the proprietors' entitlement to the completed constructed units and the period of obtaining the development order and license for development as well as consequences of breach.

[104] The proprietor of the land for development by the developer would very much be a party to the tripartite contract of sale for without its signature in the transfer form in Form 14A of the National Land Code the subdivided title would not be able to be transferred to the purchaser.

[105] Whilst the obligation to construct and build lies with the developer and so breaches of it would result in a claim for damages only against the developer, in a case where the subdivided title is not transferred to the purchaser then the cause of action is very much also against the proprietor.

[106] The Court of Appeal in *Foong Seong Equipment Sdn Bhd (receivers and managers appointed)* dealt with the question of whether housing legislation is applicable to joint venture agreements much like the one in our case. The answer was in the affirmative. The Court of Appeal reasoned as follows:

> [18] The subject matter of the JVA revolves around two pieces of land. The parties have agreed to embark on housing development. Housing development is regulated by the housing legislation. The long title to the Act makes its intention abundantly clear. It is 'to provide for the control and licensing of housing development in West Malaysia and for matters connected therewith.
>
> [19] The JVA cannot exist in a void or in isolation. As in all agreements, the is to be construed subject to written laws generally, and the housing legislation specifically. Residential properties developed pursuant to the JVA are part and parcel of housing development. These residential properties are intended to be sold to purchasers. For the purposes of sale, individual sale and purchase agreements are to be executed between the parties thereto.
>
> ...
>
> [24] Where the vendor is the housing developer, but the proprietor of the land is a different entity, as in the JVA in the instant appeal, the recital and preamble to the contract of sale provide for a tripartite contract, which includes the vendor (of the first part), the purchaser (of the second part) and the proprietor of the land (of the third part).
>
> [25] Hence it is not correct to say that the Act applies only to a developer's contract of sale with the purchaser, without the involvement of the proprietor of the land. The Act obviously involves the land proprietor who has entered into a joint venture agreement with the housing developer to develop the land on a joint venture basis, such as the JVA in the instant appeal...

[107] Indeed here the proprietor is involved in a very relevant and acute way because whilst the developer had completed and handed over vacant possession of the units to the purchasers, it is the proprietor that has reserved for itself the reversionary interest in the land to which it would assert its interest and title after the expiry of the lease.

[108] The proprietor as in the third defendant is equally bound to transfer the whole of the subdivided title to the land to each of the purchasers in this case and being a party to the SPA, the purchasers have a cause of action against the proprietor and more so when the proprietor remains the registered owner of the whole of the freehold title.

Whether in a case where a leasehold interest in the freehold subdivided title is registered in favour of the purchaser in an amended SPA without the approval of the Controller of Housing, the purchasers can claim for specific performance for a transfer of the freehold subdivided title to them

[109] The plaintiffs are claiming in effect for specific performance of the terms in the Schedule G SPA and in particular the transfer to the plaintiffs as purchasers of their respective lots as follows:

(a) the first plaintiff — Plot No 26 or Lot No 10126;

(b) the second plaintiff — Plot No 72 or Lot No 10172;

(c) the third plaintiff — Plot No 71 or Lot No 10171;

(d) the fourth and fifth plaintiffs — Plot No 69 or Lot No 10169; and

(e) the sixth and seventh plaintiffs — Plot No 27 or a Lot No 10127.

[110] The reliefs prayed for by the plaintiffs as purchasers are consistent with the reliefs granted by the Federal Court in *City Investment* where it agreed with the trial judge who had concluded as follows at p 288:

> Parties hereto would be deemed to be bound by those statutorily mandatory provisions such as those in rule 12 of the Rules as if the same were engrafted or added to the Agreement no 1 by consent.

[111] The Federal Court went on to clarify and confirm as follows at p 290:

> In the circumstances the terms and conditions under the Housing Developers Rules 1970 and in particular Rule 12(1) must be read into the agreement as if they were part and parcel of what the parties have bargained for.

[112] Where a developer makes changes to Schedule G SPA that are not approved by the Controller, the purchaser would have a right to enforce the SPA in Schedule G as prescribed as if unamended and unmodified.

A **[113]** This is not a case of the court rewriting the contract of sale for the parties but rather one in which the developer had not followed the statutory standard form contract for the SPA and what the court would do is to allow the purchasers to enforce their rights as if Schedule G had been followed to the letter.

B

[114] The statutory prohibition against modifying Schedule G contract of sale and the protection that affords to purchasers would be lost altogether if the purchasers cannot enforce what would have been their entitlement under a Schedule G SPA — a sale and transfer to them of the whole of the freehold title C to the land upon which their housing accommodation had been built.

[115] The court would read the SPA as having Schedule G grafted and incorporated into it so that no developers can escape from what had been prescribed to endorse and enforce that which had been prohibited.

D

[116] The developer is now heard to be saying that the price would be different if the transaction has been a sale of the freehold land and a housing accommodation to be constructed thereon.

E

[117] The developer cannot have the cake and eat it. It cannot openly and blatantly decide not to follow the HDA and the Regulations on its understanding that it is exempt from it and then when a court should hold that such an SPA is a breach of the Regulations, to then say that the purchasers must F pay more for the freehold title to be transferred!

[118] To allow that would be to allow the developer here to have the best of both worlds. They can try not complying with Schedule G and if found out and successfully challenged by the purchasers, then they would just revert to G what would be the price for a freehold transfer and charge the purchasers accordingly. It would be a case of 'head I win and tail I win also'. There is no sanction at all for if the developer is not brought to court it would escape non-compliance and if brought to court, it would not lose as before the purchaser gets the freehold title instead of a lease of it, the purchaser must pay H more for it.

[119] There is no evidence produced by the developer that the price would be any different between a freehold title and a lease of 99 years plus another 99 years. It would be more natural for the developer to have coasted into the I purchase consideration the cost of the land and the construction of the houses built on the various subdivided lots.

[120] In this case the developer had entered into a joint venture agreement with the land owner/proprietor with a 30% of the units built to be given to the

proprietor as in the third defendant. The costs of construction would have been fully recouped by the developer for it would be illogical and commercially senseless not to do so.

[121] After the expiry of the 99 + 99 years lease the land would revert to the proprietor and it can go for another round of development with the same or another developer.

[122] We all would be no longer around to see and witness what would happen, when the 99 + 99 years lease is about to expire and neither would the initial purchasers for our days are all numbered, some achieving their three score and ten years and if by reason of strength, four score. However we know from the law what the legal ramifications. The purchasers would be required to vacate their lease and surrender it together with their houses which had become part of the land.

[123] Legally the purchasers would have no right to remain on the lease once it has expired.

[124] Alternatively, the proprietor might unilaterally impose a sum for the renewal of the lease for a period of time as the proprietor might in its discretion so decide and the purchasers would have no negotiation power to say otherwise or to bargain for better terms. It is truly a case of take it or leave it.

[125] Why should a purchaser who had paid for the house be subject to such a raw deal when if it had been as required under the HDA and the Regulations, they would have gotten a freehold title together with the house and at liberty to deal with it as they deem fit.

[126] The purchasers get the comfort and right to have in their custody the issue document of title if they had not created a charge over the land for a loan to purchase the house. In other words, it is a title free from all encumbrances as envisaged in Schedule G and they are at liberty to deal with it as and when they please whether it be to create another charge after the first one has been discharged, for example, or to sell the house to someone else. There is no need for them to get permission from the land office to have the title released to them on their undertaking to return it to the land office for their safe keeping each time the purchasers want to deal with their leasehold interest in the freehold land still under the name of the proprietor.

[127] This is clearly a case where the purchasers have been short-changed though for now there appears to be no difference between the enjoyment of their house built on a freehold title for which they have a registered lease. As the lease comes near to its expiration the purchasers who by then might have

transferred their interest to their beneficiaries or another purchaser would begin to feel the heat and the anxiety arising out of the uncertainty as to whether they would be granted an extension of the lease and if so on what terms.

[128] In fact long before the expiry of the lease it would be most difficult to sell because any buyer would know from a search done that he is only able to buy the remainder years of the leasehold interest. Likewise no banks would be keen to finance for when there is a default and upon proceeding with an order for sale and a public auction, there would be no purchasers keen to purchase for either the remainder years left of the lease is not worth the investment or that the lease is about to expire.

[129] In fact the price of the property would deteriorate as the expiry of the lease approaches.

[130] Why should a purchase be subject to all these uncertainties when they could have and should have obtained a freehold title together with their house?

[131] It is different if one's title is a leasehold title to begin with for then the transfer is the whole of the leasehold interest in the land to the purchaser with a reversion to the State at the end of the leasehold title. In the event that the State does not need the land in all probability the purchaser would only need to pay a premium for extending the lease as is the case with many old properties in Petaling Jaya that the court can take cognisance of. Here we are not talking about a state lease but a private lease.

[132] The uncertainties are imponderable: what if the proprietor should go into liquidation, what if it should refuse to extend the lease at the expiry of the first 99 years, what if it should decide to charge the remainder years of its title and then default?

[133] The purchasers under the HDA should not have to live under such uncertainties for Parliament intended them to have custody of their title to the house and to deal with it freely as they may deem fit without the need to ask anyone for the issue document of title to deal with a private lease of 99 + 99 years!

[134] This is not a case where the purchasers would be unjustly enriched but one where the proprietor would. At any rate there is no place for unjust enrichment when the Regulations compels compliance with the statutory standard form Schedule G SPA and developers and proprietors who choose not to follow it do so at their own detriment.

[135] Learned counsel for the defendants informed the court that several schemes like this Build and Lease Scheme are in vogue in Penang and more recently in the Iskandar Development in Johor.

[136] We do not have evidence as to whether the requisite approval of the Controller of Housing had been obtained or more precisely the approval of the Minster in the light of the Federal Court's decision in *Ang Ming Lee*.

[137] As and when these cases are being challenged, the courts hearing the issues and disputes will decide accordingly with reference to the law as may be argued by counsel having regard always to decided cases and the decisions on the same issues emanating from the Federal Court.

PRONOUNCEMENT

[138] Learned counsel for the plaintiffs informed the court that if we are with the plaintiffs/appellants then they would be confining themselves to the reliefs in prayers 23.1 and 23.3 and 23.4 of the amended statement of claim.

[139] The reliefs claimed were a declaration that the SPA ought to have been in conformity with Schedule G of the Regulations (prayer 23.1) and an order that the first defendant do transfer and the third defendant do cause the first defendant to transfer the freehold of the respective plaintiffs' lots to the plaintiffs (prayer 23.3). Consequently an order that the lease granted to the plaintiffs in respect of the plaintiffs' lots be cancelled (prayer 23.4).

[140] Their other damages claims on conspiracy was premised on what they said is a case where the directors of both the developer and the proprietor in the other defendants knew or ought to have known that there was a need for the Controller to approve the amendments and modifications and yet they went ahead with the launch, construction and sale and granting of a private lease in open defiance of the rejection by the Controller of Housing to the proposed modifications to the Schedule G SPA.

[141] After hearing arguments from all the counsel involved in these related appeals we had allowed the plaintiffs/appellants appeal against the first defendant/respondent developer and the third defendant/respondent only for the reasons given above. We granted the reliefs in prayers 23.1 and 23.3 and 23.4 of the amended statement of claim and the plaintiffs/appellants shall bear all costs of the transfer. The transfer shall be effected within three months of this order.

A **[142]** In line with the indication given by learned counsel for the plaintiffs on the reliefs sought against the other defendants, we had struck out the appeals against the other defendants.

B **[143]** We had also dismissed the appeal of the first defendant/appellant in a related appeal against Loh Tina as the sole respondent as it was clear that the shortfall claimed against her for the purchase price was actually a discount given to her for introducing purchasers to purchase the units. The credit note itself with the words 'discount rebate' is clear indication of this and it is too late for the developer to resile from it merely because the purchaser Loh Tina is now C suing the developer. Both the gross purchase value and the net purchase value are further stated to clarify and clear all doubts.

D **[144]** We allowed the agreed costs of RM15,000 from the first respondent and the third respondent here and costs of RM25,000 below each from the first respondent and the third respondent to be paid to the plaintiffs/appellants. The first respondent and third respondent would each have to return to the plaintiffs/appellants the costs of RM25,000 in the High Court already paid to them.

E **[145]** Costs paid by the plaintiffs/appellants in the High Court shall be repaid back within one month from the date of this order.

F **[146]** The fourth, fifth and sixth respondent shall be entitled to costs of RM10,000 against the plaintiffs/appellants jointly and severally as the appeal against them were struck out.

[147] The order of the High Court was set aside only with respect to first and third defendant.

G **[148]** As for Appeal No 569 on the counterclaim, we ordered costs of RM5,000 to be paid by the appellant Kemuning Setia to the respondent Loh Tina.

H *Order accordingly.*

Reported by Nabilah Syahida Abdullah Salleh

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